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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

16
17 IN RE: HIGH-TECH EMPLOYEE
ANTITRUST LITIGATION
18
19 THIS DOCUMENT RELATES TO:
20 ALL ACTIONS

Master Docket No. 11-CV-2509-LHK

**DEFENDANTS' NOTICE OF MOTION,
JOINT MOTION FOR TEMPORARY
STAY OF DISCOVERY;
MEMORANDUM OF POINTS AND
AUTHORITIES**

ORAL ARGUMENT REQUESTED

Date: December 8, 2011

Time: 1:30 p.m.

Courtroom: 8

Judge: Hon. Lucy H. Koh

Complaint Filed: May 4, 2011

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NOTICE OF MOTION AND MOTION TO STAY

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 8, 2011 at 1:30 pm, or as soon thereafter as this matter may be heard in Courtroom 8, 4th Floor, of the United States District Court, Northern District of California, located at 280 South 1st Street, San Jose, California, the Honorable Lucy H. Koh presiding, Defendants Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar will and hereby do move this Court for an order temporarily staying discovery until the Court rules on Defendants' pending Joint Motion to Dismiss the Complaint and determines that Plaintiffs have alleged a viable claim for relief.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities in support thereof, Declaration of Lee H. Rubin and exhibits thereto, any Reply Memorandum, the pleadings and files in this action, and such arguments and authorities as may be presented at or before the hearing.

STATEMENT OF ISSUE PRESENTED

Whether discovery should be stayed until the Court has ruled on Defendants’ Motion to Dismiss Plaintiffs’ Consolidated Amended Complaint (“Complaint”). A temporary stay is appropriate under Fed. R. Civ. P. 26(b)(2)(C) and the two-part test for a discovery stay commonly used in this circuit, as Defendants’ pending motion to dismiss should dispose of all of Plaintiffs’ claims and may be decided without any discovery. Moreover, as recognized by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), a stay is particularly appropriate in complex antitrust cases such as this one, where the burden of requiring Defendants to engage in broad, costly and invasive discovery should only be shouldered *if* this Court determines that Plaintiffs can plead a viable claim.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This motion for a temporary stay of discovery meets the two-part test generally applied by federal courts in California. First, Defendants’ motion to dismiss, filed on October 13, 2011 (Docket No. 79), should dispose of the entirety of Plaintiffs’ Complaint. Second, the motion may be decided on the pleadings, and without any discovery. For these reasons alone, this Court should stay discovery unless and until Plaintiffs can allege at least one valid claim.

Moreover, as recognized by the Supreme Court in *Twombly*, 550 U.S. at 556, a stay is particularly appropriate in complex antitrust cases such as this one, where the burden of requiring Defendants to engage in broad, costly and invasive discovery should only be shouldered *if* this Court determines that Plaintiffs can plead a viable claim. The Supreme Court directed federal courts to “avoid the potentially enormous expense of discovery in cases with no ‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ to support a §1 claim.” *Id.* at 559-560 (quoting *Dura Pharmaceuticals v. Broudo*, 544 U.S. 536, 547 (2007)). Long-standing Ninth Circuit precedent is in accord: a trial court “abdicat[es its] judicial responsibility” if it allows a plaintiff to subject defendants to the “prohibitive” expense of discovery without first “determin[ing] whether there is any reasonable likelihood that plaintiff[]

1 can construct a claim.” *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir.
2 1987).

3 This case presents those precise circumstances—Plaintiffs here seek to certify a
4 nationwide class of plaintiffs with a Complaint that presents a legally deficient and implausible
5 claim of an overarching conspiracy among all defendants and an equally deficient claim of injury
6 arising from this purported conspiracy. As detailed in Defendants’ motion to dismiss, Plaintiffs
7 have merely alleged the existence of six independent agreements, each involving only two
8 companies and, with one exception, prohibiting no conduct other than “cold calling.” But
9 Plaintiffs fail to allege any facts that could plausibly convert these bilateral agreements into the
10 overarching conspiracy Plaintiffs have alleged existed among Defendants to suppress the wages
11 of all their employees nationwide over a five-year period. And Plaintiffs similarly fail to allege
12 any facts showing how the alleged conspiracy caused them injury, nor can they, given that any
13 relevant labor market would be much broader than the seven named Defendants.

14 Plaintiffs’ current (and legally deficient) Complaint as written would encompass claims
15 by tens, if not hundreds, of thousands of class members and, if discovery is permitted to proceed,
16 Defendants will incur significant litigation costs. Indeed, in its initial document requests,
17 Plaintiffs have already demanded discovery into nearly every aspect of Defendants’ recruitment,
18 hiring, retention and compensation practices, among others, spanning more than a decade,
19 including all documents relating to (1) agreements regarding cold-calling, recruiting, and
20 restrictions on employment offers or counteroffers; (2) employee compensation, productivity,
21 morale, turnover, or loss; (3) termination, retirement, discipline, demotion, discharge,
22 suspension, severance or change in position of anyone responsible for recruiting or hiring; and
23 (4) business plans, analyses, budgets, forecasts, strategic plans, market and market information
24 regarding compensation and the labor market. (RFPs 9-11, 13-22, 24.) Moreover, Plaintiffs ask
25 Defendants to identify, for each individual they employed over the last eight years, the location
26 where that individual worked, their total compensation, and title and responsibilities. (RFP 23.)

27 Only by deciding whether Plaintiffs’ claims meet the demands of *Twombly* before
28 permitting discovery to proceed will the Court give full effect to its holding, which is designed to

1 ensure that appropriate and timely judicial scrutiny of the validity of the pleadings in fact will
 2 “avoid the potentially enormous expense of discovery” in meritless antitrust cases, 550 U.S. at
 3 559-560. Accordingly, Defendants respectfully ask this Court to postpone discovery temporarily
 4 until Plaintiffs have satisfied the Court that they can state at least one valid claim. Plaintiffs will
 5 suffer no prejudice from awaiting the start of discovery in order to allow the Court to assess the
 6 viability of their claims.

7 **II. BACKGROUND**

8 Plaintiffs’ Complaint parrots allegations made by the U.S. Department of Justice
 9 following its review in 2009 and 2010 of alleged “no cold calling” agreements between certain
 10 pairs of companies. (Compl. ¶ 111.) Without admitting any wrongdoing or violation of law
 11 (Judgments at 2), Defendants entered into stipulated proposed judgments with the DOJ, pursuant
 12 to which they agreed not to engage in non-solicitation agreements except under certain
 13 circumstances. (Compl. ¶ 115.) The DOJ alleged in its complaints filed as part of the consent
 14 decrees that its investigation focused on five bilateral no cold call agreements among Adobe,
 15 Apple, Google, Intel, Intuit, and Pixar (Complaint, *United States v. Adobe Sys. Inc., Apple Inc.,*
 16 *Google Inc., Intel Corp., Intuit, Inc. & Pixar*, No. 1:10-cv-01629-RBW (D.D.C. Sept. 24, 2010),
 17 ¶ 1 (emphasis added)), later adding a similar complaint and consent decree regarding an alleged
 18 bilateral agreement between Lucasfilm and Pixar. Both stipulated judgments recognize that
 19 there are many circumstances under which Defendants may legitimately agree not to cold call
 20 each other’s employees. (Final Judgments at section V.) These stipulated judgments carry no
 21 *prima facie* effect in related civil litigation. *See* 15 U.S.C. § 16(a); *United States v. Nat’l Ass’n*
 22 *of Broadcasters*, 553 F. Supp. 621, 623, n.5 (D.D.C. 1982) (holding that private antitrust actions
 23 may not give *prima facie* effect to government consent decrees entered before oral testimony was
 24 taken).

25 Shortly after the Court entered the DOJ consent decrees, Plaintiff Siddharth Hariharan
 26 filed the first in a series of complaints against the same seven companies that had settled with the
 27 DOJ. Hariharan alleged that he worked for Lucasfilm as a software engineer for approximately
 28 seventeen months, from mid-January 2007 through mid-August 2008. (Compl. ¶ 18.)

1 Thereafter, Plaintiffs Michael Devine, Brandon Marshall, Mark Fitchner, and Daniel Stover filed
 2 similar complaints. These additional Plaintiffs alleged that they worked as software engineers at
 3 various times for three of the seven Defendants (Adobe, Intel, and Intuit) in three different states
 4 (California, Arizona, and Washington). (*Id.* ¶¶ 16-20.) The complaints were assigned to this
 5 Court in August 2011, and Plaintiffs thereafter filed a superseding Consolidated Amended
 6 Complaint.

7 Defendants are seven companies—Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and
 8 Pixar—described in the Complaint as belonging to an undefined group of “high technology
 9 companies.” (*Id.* ¶ 43.) Plaintiffs’ factual allegations are taken wholesale, and often verbatim,
 10 from the factual allegations in the DOJ complaints. According to the Complaint, Defendants
 11 allegedly entered into six bilateral agreements over a two-year period “not to cold call each
 12 others’ employees.” (*Id.* ¶¶ 59, 73, 79, 85, 98, 104.) Plaintiffs claim that these agreements
 13 constituted an “interconnected web of express agreements” amounting to an “overarching
 14 conspiracy” between Defendants. (*Id.* ¶ 55.)

15 Based on these allegations, the Complaint asserts claims under Section 1 of the Sherman
 16 Act, California’s Cartwright Act, and Sections 16600 and 17200 of the California Business and
 17 Professions Code. (*Id.* ¶ 5.) Plaintiffs seek to represent a class of all “salaried” employees of
 18 Defendants over a five-year period regardless of the positions they held, with exclusions for
 19 retail employees and Defendants’ corporate officers, board members, and senior executives. (*Id.*
 20 ¶ 30.) By its terms, the class would include not only software engineers like the named
 21 plaintiffs, but also secretaries, accounting personnel, in-house counsel, and Intel’s fabrication
 22 workers. Based on Defendants’ initial inquiry, this putative class would total more than 83,300
 23 members, spread across the United States.

24 It is clear that Plaintiffs intend to seek discovery that is massive in scope and enormously
 25 complex. As noted above, Plaintiffs have already served their first set of special interrogatories
 26 and documents requests. In them, Plaintiffs seek not just discovery limited to the alleged “cold-
 27 calling agreements” among Defendants, but wide-ranging discovery related to nearly every
 28 aspect of Defendants’ recruiting, hiring, promotion, and compensation practices, including all

1 documents related to the “change in position” of any employee with “input in recruiting, hiring,
 2 or retaining of salaried employees” (Request No. 13), all plans, reports, memoranda, etc.
 3 “relating, in whole or in part, to recruiting, hiring, or retaining employees” (Request No. 14), all
 4 documents “concerning any analysis, summary, or description of factors affecting” employee
 5 productivity or morale (Request No. 18), and all documents regarding communications with any
 6 third parties used by Defendants for recruiting, compensation, or analyzing any other related
 7 topic (Request No. 39). (Declaration of Lee Rubin Ex. A (Requests for Production).) Plaintiffs
 8 seek more than ten years of documents, from January 2001 to the present. *Id.* Plaintiffs also ask
 9 Defendants to identify, for each individual they employed over the last eight years, the location
 10 where that individual worked, their total compensation, and title and responsibilities. (*Id.* (RFP
 11 23).) Similarly, Plaintiffs’ Interrogatories seek more than eight years of information, including
 12 identification of any employee with knowledge about any “Agreement” (defined to include any
 13 arrangement or understanding regarding recruitment, among other things) or knowledge of any
 14 discussions or decisions about any agreements, or knowledge of any bilateral meetings about
 15 agreements. (Rubin Decl. Ex. B.)¹

16 On October 3, 2011, the parties met and conferred on case management topics, including
 17 how discovery should proceed in this case. In those October 3 discussions and thereafter,
 18 Defendants indicated their intention to file a motion to dismiss by October 13, and indicated that
 19 discovery should not proceed at all unless/until the pleadings are resolved. Plaintiffs want
 20 discovery to proceed without delay and in fact served their first set of written discovery on
 21 October 3, the same day as the Rule 26(f) conference. Unable to reach an agreement temporarily
 22 postponing discovery, Defendants have filed this motion.

23
 24
 25
 26 ¹ Of course, Defendants reserve all rights to object to this discovery, including the scope of the
 27 requests. As such, a stay would prevent not only the burden to Defendants in responding to
 28 Plaintiffs’ requests and reviewing, gathering and producing documents, but it would also avoid
 burdening both parties (and possibly the Court) with premature discovery disputes over claims
 that may be limited or even dismissed.

1 **III. ARGUMENT**

2 Plaintiffs' Sherman Act claim and state-law claims are subject to a pending motion to
 3 dismiss pursuant to *Twombly* and other grounds. If granted, Defendants' motion to dismiss
 4 would dispose of all claims asserted and requires no discovery for its adjudication. Accordingly
 5 a temporary stay of discovery should be granted. Furthermore, a stay is particularly appropriate
 6 in the antitrust context. Both the Supreme Court and Ninth Circuit have instructed lower courts
 7 to be extremely vigilant not to allow the expensive discovery process that typically accompanies
 8 antitrust litigation to proceed before it is determined that a valid antitrust claim has been pleaded.
 9 Here, a stay would avoid burdening the parties and the Court with sensitive, complex, and costly
 10 discovery unless and until Plaintiffs have shown they can plead at least one valid claim.²

11 **A. A Temporary Stay of Discovery Is Appropriate Because Defendants' Motion** 12 **to Dismiss Targets All of Plaintiffs' Claims, Requires No Discovery, and** 13 **Could Avoid Costly Discovery**

14 1. *This case meets the two-part test to stay discovery*

15 As this circuit has noted, "[t]he purpose of F.R.Civ.P. 12(b)(6) is to enable defendants to
 16 challenge the legal sufficiency of complaints without subjecting themselves to discovery."
 17 *Rutman Wine*, 829 F.2d at 738. Consistent with this purpose and the trial court's power to stay
 18 proceedings in order to most efficiently and fairly manage its docket, *see Yong v. I.N.S.*, 208 F.3d
 19 1116, 1119-20 (9th Cir. 2000), federal courts in California utilize a two-part test to determine
 20 whether to stay discovery pending resolution of a dispositive motion:

21 First, a pending motion must be potentially dispositive of the entire case, or at
 22 least dispositive on the issue at which discovery is directed. Second, the court
 23 must determine whether the pending dispositive motion can be decided absent
 discovery.

24 ² Although Plaintiffs are fully aware that Defendants would be filing both their Joint Motion to
 25 Dismiss and the instant Motion to Stay by October 13, 2011, and despite that fact that responses
 26 to Plaintiffs' discovery requests are not due for several weeks, Plaintiffs insisted on filing a joint
 27 report before Magistrate Judge Lloyd (Docket No. 76) seeking an order that discovery proceed.
 28 As detailed in Defendants' portion of the joint report, there is no currently ripe discovery dispute
 that should be properly put before Magistrate Judge Lloyd, and Plaintiffs' request for an advisory
 order from Magistrate Judge Lloyd is inappropriate. Rather, the issue of the stay of discovery is
 properly resolved by this Court.

1 *Hall v. Tilton*, No. C 07-3233 RMW (PR), 2010 WL 539679, at *1 (N.D. Cal. Feb. 9, 2010)
 2 (staying discovery pending disposition of motion to dismiss).

3 Applying that two-part test (or substantially similar standards), the Ninth Circuit and
 4 other courts of appeals frequently have affirmed stays of discovery pending pleadings
 5 challenges. *See, e.g., Sepulveda v. Dep't of Treasury*, 295 Fed. Appx. 160, 160-61 (9th Cir.
 6 2008) ("The district court did not abuse its discretion by denying as premature Sepulveda's
 7 motion to compel production of documents because the court had not yet resolved defendants'
 8 motion to dismiss."); *Jarvis v. Regan*, 833 F.2d 149, 155 (9th Cir. 1987) ("The district court did
 9 not abuse its discretion [in ordering a stay of discovery]. Discovery is only appropriate where
 10 there are factual issues raised by a Rule 12(b) motion.") (citation omitted); *Wood v. McEwen*,
 11 644 F.2d 797, 801 (9th Cir.1981) (affirming grant of protective order staying discovery). *See*
 12 *also Horsley v. Feldt*, 304 F.3d 1125, 1131 n.2 (11th Cir. 2002) (affirming discovery stay
 13 pending motion to dismiss).³

14 This case clearly satisfies the two-part test to stay discovery pending resolution of
 15 Defendants' motion to dismiss. First, Defendants' motion to dismiss challenges all of Plaintiffs'
 16 claims and, if granted, would be dispositive of the entire Complaint. Second, the motion can
 17 (and must) be decided without any discovery. Defendants' motion to dismiss consists of "facial
 18 challenges to the legal sufficiency of [Plaintiffs'] complaint ...; there are no issues of fact
 19 because the allegations contained in the pleadings are presumed to be true" for the purpose of a
 20 motion to dismiss. *Horsley*, 304 F.3d at 1131 n.2. Thus, the standard for granting a stay is easily
 21 satisfied and the Court can, and should, grant a temporary stay here based on this reason alone.

22 ³ *See also Hanni v. American Airlines, Inc.*, C-08-00732 CW, 2009 WL 1505286, at *7 (N.D.
 23 Cal. May 27, 2009) (staying discovery pending disposition of motion to dismiss); *Joseph v. Las*
 24 *Vegas Metropolitan Police Dept.*, No. 2:09-cv-00966-HDM-LRL, 2011 WL 1561057, at *3 (D.
 25 Nev. Apr. 25, 2011) (same); *Ameritel Inns v. Moffat Bros. Plastering, L.C.*, No. CV 06-359-S-
 26 *EJL*, 2007 WL 1792323, at *4 (D. Idaho June 20, 2007) (same, finding no factual issues in
 27 "immediate need of exploration" were present); *Johnson v. New York Univ. School of Educ.*, 205
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 (same); *Temple of Lost Sheep, Inc. v. Abrams*, No. CV-88-3675 (ADS), 1990 WL 156139, at *4
 (E.D.N.Y. Sept. 26, 1990) (affirming previously entered order to stay discovery pending ruling
 on motion to dismiss because "there [we]re no factual issues in need of further immediate
 exploration, and the issues before the court [we]re purely questions of law").

2. *This case is also properly stayed under Supreme Court and Ninth Circuit precedent discouraging premature, burdensome discovery in antitrust cases*

In addition to meeting the general two-part test, there are particularly compelling reasons this case should be stayed—it is a complex, antitrust case. As a result, discovery is likely to be particularly burdensome (and therefore particularly wasteful in the event Defendants’ motion to dismiss is granted). Both the Supreme Court and the Ninth Circuit have recognized the beneficial use of a temporary discovery stay for antitrust cases, which are likely to be unusually burdensome. In *Twombly*, 550 U.S. at 556, the Supreme Court held that, to stave off a motion to dismiss, an antitrust plaintiff must allege enough specific facts to “plausibly” “raise a reasonable expectation of illegal agreement”—mere “labels and conclusions” are insufficient to sustain a complaint. *Id.* In so holding, the Court expressly noted that discovery in antitrust cases is often extremely expensive, intrusive and burdensome, and that “it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.” *Id.* at 558-60 (citations omitted) (observing the “obvious” potential expense of antitrust discovery). The Court emphasized the importance of lower courts determining the plausibility of an antitrust complaint “before allowing a potentially massive factual controversy to proceed.” *Id.* at 558 (quotations omitted).⁴

Post-*Twombly*, courts in this and other circuits have regularly stayed discovery in antitrust cases until after resolution of a motion to dismiss. As the Ninth Circuit held in *Rutman Wine*:

The purpose of F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery. In antitrust cases *this procedure especially makes sense because the costs of discovery in such actions are prohibitive*. [I]f the allegations of the complaint fail to establish the requisite elements of the cause of action, our requiring costly and time consuming discovery and trial work would represent an abdication of our judicial responsibility. It is sounder practice to determine whether there is any reasonable

⁴ See also *id.* at 559 (“[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management’” as the mere threat of antitrust discovery “will push cost-conscious defendants to settle even anemic cases . . .”); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

1 likelihood that plaintiffs can construct a claim before forcing the parties to
2 undergo the expense of discovery.

3 829 F.2d at 738 (citations and quotation marks omitted, emphasis added). *See also Beck v.*
4 *Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009) (holding, in light of *Twombly*, discovery is not
5 warranted in complex cases “unless the complaint indicates that the plaintiff’s case is a
6 substantial one”); *In re Travel Agent Comm’n Antitrust Litig.*, 583 F.3d 896, 909 (6th Cir. 2009)
7 (“[p]ursuant to *Twombly*, district courts must assess the plausibility of an alleged illegal
8 agreement before parties are forced to engage in protracted litigation and bear excessive
9 discovery costs”).⁵

10 The circumstances of this case present just the type of “massive factual controversy”
11 warranting a stay identified in *Twombly* and *Rutman*. As detailed in Defendants’ motion to
12 dismiss, Plaintiffs’ Complaint contains numerous fatal defects, including a failure to allege any
13 viable conspiracy at all and an abject failure to plead a plausible claim of injury. Thus, Plaintiffs
14 appear unable to state any viable claim against Defendants, and the parties and the Court should
15 not be forced to engage in expensive, intrusive and burdensome discovery until that threshold
16 issue is resolved. Plaintiffs have alleged a putative class of over 83,300 nationwide employees
17 of seven Defendants, and seek discovery into nearly every aspect of Defendants’ recruitment,
18 hiring, firing, and compensation practices over the course of a decade, not to mention vast
19 categories of electronic data (from all of Defendants’ varying systems). Plaintiffs should at least
20 be required to establish a viable claim before Defendants are forced to engage in the burdens of
21 antitrust discovery in this case. As the Ninth Circuit held in *Rutman Wine*, a trial court would be
22 “abdicat[ing its] judicial responsibility” and failing to adopt the “sounder practice” if it let a
23 plaintiff proceed to discovery with “prohibitive” costs, without first “determin[ing] whether there

24 ⁵ *See also, e.g., Ralston v. Mortgage Investors Group, Inc.*, C 08-536 JF, 2010 WL 1136317, *4
25 (N.D. Cal. Mar. 22, 2010) (granting motion to stay antitrust discovery due to pending motion to
26 dismiss); *In re Graphics Processing Units Antitrust Litig.*, No. C 06-07417, 2007 WL 2127577,
27 *5 (N.D. Cal., Jul. 24, 2007) (same); *DSM Desotech, Inc. v. 3D Sys. Corp.*, No. 08 CV 1531,
28 2008 WL 4812440, *3 (N. D. Ill. Oct. 28, 2008) (staying discovery and holding that “the
 principles underlying *Twombly* counsel in favor of granting [a] motion to stay” in antitrust
 cases); *McLafferty v. Deutsche Lufthansa A.G.*, No. 08-1706, 2008 WL 4612856, *2 (E.D. Pa.
 2008) (same).

1 is any reasonable likelihood that plaintiff[] can construct a claim.” 829 F.2d at 738.

2 Indeed, discovery in this case promises to be far more expensive and burdensome than
3 the discovery contemplated in *Rutman Wine*. There, the plaintiff alleged that a competitor had
4 improperly terminated a distributor relationship and conspired with a (single) third party to
5 monopolize “the wine products market in Cuyahoga County, Ohio.” *Id.* at 732. Just those
6 allegations—two businesses conspiring to sell wine in Cleveland—suggested discovery that the
7 Ninth Circuit described as “prohibitive.” *Id.* at 738. The Ninth Circuit found the costs of that
8 potential discovery so prohibitive that it held not only that a district court could stay discovery
9 until the pleadings were settled, but furthermore that a district court would be abdicating its
10 judicial duties if it failed to do so.

11 Plaintiffs’ allegations here of course are far more complex than the *Rutman Wine*
12 allegations, where two businesses conspired to sell beverage products in one U.S. city.
13 Discovery into Plaintiffs’ claims—if allowed to proceed under their current Complaint—would
14 include wide-ranging discovery into the recruiting and compensation practices of the Defendants,
15 likely discovery from a significant number of third parties, and a foray into a broad swath of
16 other corporate documents spanning more than a decade. As the many courts cited above have
17 recognized, *Twombly* underscores the need for prudent restrictions on discovery required by
18 *Rutman Wine*. Those two controlling precedents make clear that the Court should not permit that
19 type of “prohibitive[ly]” expensive discovery sought by Plaintiffs here before determining
20 whether Plaintiffs have stated an antitrust claim that would entitle them to relief.

21 Plaintiffs have suggested that they have an unfettered right to receive all documents
22 Defendants produced during a government investigation, merely by virtue of the fact they have
23 filed a lawsuit that refers to the government investigation and their belief that the production of
24 those documents would impose a minimal burden on Defendants. But the previous production of
25 documents to the government does not render them automatically subject to discovery here,
26 particularly where a pending motion to dismiss will dispose of the entire case. Moreover,
27 identifying and producing a subset of documents from the Department of Justice production
28 relevant to the claims and defenses here would entail time and expense, the precise expenditure

1 of resources that *Twombly* and *Rutman* counsel against in the absence of a finding that Plaintiffs
 2 have stated a viable antitrust claim. And a temporary stay of discovery would promote judicial
 3 economy, avoiding the court's expenditure of time and resources on discovery disputes
 4 (including likely disputes regarding the discoverability of documents previously produced to the
 5 government) on matters that may well be rendered moot if the Court grants Defendants' motion
 6 to dismiss.

7 **B. A Temporary Stay of Discovery Will Not Prejudice Plaintiffs**

8 A temporary stay of discovery in this case is appropriate as it will not prejudice Plaintiffs.
 9 *See, e.g., Wood*, 644 F.2d at 801 (affirming district court's stay of discovery in light of pending
 10 motion to dismiss where "there was a real question" whether plaintiff could state a claim for
 11 relief and plaintiff did not allege any prejudice). If Plaintiffs can convince this Court in the
 12 future that they can state a valid claim as a matter of law, they "will still have ample time and
 13 opportunity to conduct discovery on the merits." *Orchid Biosciences, Inc. v. St. Louis Univ.*, 198
 14 F.R.D. 670, 675 (S.D. Cal. 2001). By contrast, if Defendants "prevail on [their] motion to
 15 dismiss, any effort expended in responding to merits-related discovery would prove to be a waste
 16 of both parties' time and resources." *Id.*

17 Plaintiffs have identified no prejudice they will suffer if discovery does not occur
 18 immediately. Indeed, this Court has already ordered the parties to take reasonable steps to
 19 preserve relevant documents. (Dkt. No. 64 at 11.) Moreover, the parties have agreed to
 20 exchange initial disclosures on October 17 as mandated under Rule 26 and otherwise cooperate
 21 with Plaintiffs in negotiating stipulations, protective orders and scheduling of motions. (Rubin
 22 Decl. ¶ 3.)⁶ If Plaintiffs are convinced they can state a valid claim, they should have little

23 ⁶ For example, Defendants have agreed to continue to meet and confer with Plaintiffs regarding
 24 (i) a format for the production of electronic documents and (ii) a protective order and a
 25 stipulation regarding the handling of expert discovery. *Id.* Defendants have also offered to
 26 discuss an accelerated schedule for briefing the instant motion to stay discovery. *Id.* Thus, any
 27 suggestion by Plaintiffs that Defendants failed to meet and confer on the topics required by Rule
 28 26 is meritless. Rather, Plaintiffs made a series of one-sided demands that Defendants provide
 information on a host of topics not required by Rule 26.

1 concern that they will eventually obtain all the discovery to which they are entitled. But, if
 2 Defendants are correct that they cannot, this Court can save the parties (and itself) the
 3 considerable time and expense of an exceptionally burdensome discovery process. Put another
 4 way, Defendants should not be forced to expend the considerable time and resources that the
 5 requested discovery will demand before it is determined that Plaintiffs have stated a cognizable
 6 claim, nor should the Court be burdened with discovery disputes over issues that may be moot
 7 following a ruling on Defendants' motion to dismiss. Such a stay is mandated by the
 8 fundamental principle underlying *Twombly*.

9 **IV. CONCLUSION**

10 For all the foregoing reasons, this Court should stay discovery pending resolution of the
 11 pleadings in this case.

12 Dated: October 13, 2011

MAYER BROWN LLP

13
14 By: /s/ Lee H. Rubin

15 Lee H. Rubin
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18 Dated: October 13, 2011

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ATTESTATION OF CONCURRENCE IN FILING

Pursuant to General Order No. 45, Section X(B) regarding signatures, I, Lee H. Rubin, hereby attest that concurrence in the filing of this Defendants' Notice of Motion, Joint Motion for Temporary Stay of Discovery, and Memorandum of Points and Authorities has been obtained from Defendants Apple Inc., Intel Corp., Lucasfilm Ltd., Adobe Systems Inc., Intuit Inc., and Pixar.

Dated: October 13, 2011

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